BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2020-263-E

Cherokee County Cogeneration Partners, LLC	)	
	)	**DIRECT TESTIMONY OF KENDAL C. BOWMAN ON BEHALF OF DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC**
Complainant/Petitioner,	)	
	)	
v.	)	
	)	
Duke Energy Progress, LLC and Duke Energy Carolinas, LLC,	)	
	)	
Defendants/Respondents.	)	

I. INTRODUCTION AND PURPOSE

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Kendal Crowder Bowman. My business address is 410 South Wilmington Street, Raleigh, North Carolina 27601.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed as Vice President Regulatory Affairs and Policy North Carolina for Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively the "Companies"), which are wholly owned subsidiaries of Duke Energy Corporation ("Duke Energy").

Q. PLEASE BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE.

A. I have a Bachelor of Science in Psychology from the University of Virginia and a Juris Doctor from Stetson University College of Law. I began my professional work experience in 1997 as an attorney for Florida Power Corporation in St. Petersburg, Florida. In 1999, I joined Carolina Power & Light Company as an associate general counsel. Shortly after I joined Carolina Power & Light Company, it merged with Florida Power Corporation and became Progress Energy. After the close of that merger, I was Progress Energy's attorney for Federal Energy Regulatory Commission ("FERC") matters for all regulated utilities and our unregulated merchant generation operations. Upon Progress Energy's exit from the unregulated merchant generation business in the early 2000s, I led Progress Energy's legal federal regulatory affairs group and was responsible for FERC legal, policy, and compliance matters for Progress Energy Carolinas and Progress Energy Florida. In 2010, I transitioned from FERC work to state regulatory legal work for Progress Energy Carolinas in both North Carolina and South Carolina. Following the merger between Duke Energy and Progress Energy, I became Deputy General Counsel supporting all legal state regulatory functions for North Carolina. In February 2013, I was named to my current role with Duke Energy Corporation. In 2021, I was appointed to the Energy Policy Council of North Carolina.

Q. PLEASE SUMMARIZE YOUR SPECIFIC EXPERIENCE WITH PURPA.

A. I have extensive experience with the federal regulatory framework implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[1] including FERC's implementing regulations. I am also familiar with the history of PURPA implementation in both North Carolina and South Carolina.

In 2016, I testified before FERC in Docket No. AD16-16-000 regarding FERC's reassessment of its PURPA implementation regulations. In 2017, I testified before the North Carolina Utilities Commission ("NCUC") in the NCUC's 2016 avoided cost proceeding, Docket No. E-100, Sub 148, regarding the history of PURPA and the Companies' experience with PURPA implementation in North Carolina.

[1] 16 U.S.C. § 824a-3.

Q. HAVE YOU BEEN INVOLVED WITH THE COMPANIES' NEGOTIATIONS WITH CHEROKEE COUNTY COGENERATION PARTNERS, LLC ("CHEROKEE")?

A. No, but I have reviewed the Complaint filed in this proceeding by Cherokee and the other pleadings, and am testifying for DEC and DEP on specific PURPA-related compliance issues based on my expertise in that area.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. My testimony addresses legal principles and policy issues raised by Cherokee's Complaint related to the implementation of PURPA. In particular, I first discuss how rates paid to qualifying facilities ("QFs") must be limited to avoided costs to be lawful, and that it is unlawful under PURPA to pay QFs above avoided costs. Second, I address how DEC and DEP are each an electric utility under PURPA that have independent mandatory purchase obligations from QFs. There is no "joint obligation" to purchase QF output under PURPA. Third, I provide an overview of FERC policy regarding legally enforceable obligations or "LEOs," and show that Cherokee's actions demonstrate that Cherokee never made a legally enforceable commitment to sell and deliver its capacity and energy to either DEC or DEP over a specified future term, as provided for under FERC's regulations. Fourth, I address the "first year of capacity need" concept under PURPA to demonstrate that DEC and DEP have reasonably calculated the avoided capacity rates offered to Cherokee consistent with both FERC's PURPA regulations and this Commission's recent Order No. 2019-881(A) implementing PURPA for DEC and DEP in South Carolina.

Finally, I explain that while PURPA provides QFs the option to wheel power to non-interconnected utilities, the QF is obligated to obtain transmission service from the interconnected utility and to deliver power to the purchasing utility consistent with the utility's open access transmission tariff ("OATT").

II. PURPA AVOIDED COST RATES FRAMEWORK

Q. PLEASE PROVIDE THE COMMISSION WITH AN EXPLANATION OF PURPA AND ITS PURPOSE.

A. PURPA was enacted in 1978 in response to the mid-1970s energy crisis, to promote conservation of oil and natural gas by electric utilities, thereby lessening the country's dependence on foreign oil, and ultimately intending to control costs for consumers. Title II of PURPA, specifically Section 210, also established a new policy of encouraging development of non-utility owned cogeneration and small power production facilities. Section 210 of PURPA was largely driven by concerns that traditional electric utilities during the 1970s were reluctant to purchase power from and to sell power to these nontraditional facilities.[2] To encourage development of these new wholesale power generators, Congress mandated that they should have the right to sell power to and purchase back-up power from traditional utilities, and also should be exempt from certain financial and rate regulation burdens imposed on

[2] *See FERC v. Mississippi*, 456 U.S. 742, 750 (1982) (holding that Congress "felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development" (internal citations omitted)).

traditional public utilities, effectively exempting these generators from federal or state regulatory oversight of their books and cost of service. Thus, from PURPA's initial enactment, Congress provided significant "regulatory encouragement" of cogeneration and small power production facilities compared to traditional fully-regulated public utilities. However, Section 210 was also expressly focused on controlling costs for consumers, requiring utilities to purchase power from cogenerators and small power production facilities at non-discriminatory rates that are just and reasonable to the utility's customers and in the public interest.

Q. HOW DID CONGRESS ENSURE PURPA WAS JUST AND REASONABLE FOR CONSUMERS?

A. Congress directed FERC to develop regulations to implement PURPA, but, in doing so, explicitly forbade such rules from requiring a utility to pay a rate that would exceed the incremental cost of its alternative options of generating or purchasing electric energy, *i.e.*, the cost to the utility which "but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source."[3] In other words, it is the purchasing utility's incremental or "avoided" cost that PURPA requires to be paid, which ensures customers remain "indifferent" between the costs of utility or non-utility generation. Thus, on its face, Section 210's encouragement of cogeneration and small power production facilities provides QFs a right to sell

[3] 16 U.S.C. § 824a-3(b); (d).

at rates that are "just and reasonable to the electric consumers . . . and in the public interest" but has never expressed a legislative intent to subsidize this class of non-utility generators.

Q. IN ENACTING SECTION 210 OF PURPA, HOW DID CONGRESS PRESCRIBE FERC'S ROLE AND THE COMMISSION'S ROLE?

A. Section 210 of PURPA established a program of "cooperative federalism"[4] under which Congress directed FERC to promulgate regulations to implement PURPA, while state regulatory authorities, such as the Commission, and non-regulated utilities are ultimately responsible for state-by-state PURPA implementation in conformance with FERC's regulations.

In 1980, FERC's Order No. 69 established regulations to implement PURPA.[5] Under FERC's regulations, cogenerators and small power producers, collectively called "Qualifying Facilities," were granted new rights to interconnect to the electrical grid and to sell their output to traditional utilities in the wholesale marketplace. Specific to the utility's obligation to purchase from QFs, FERC's regulations provide that rates for purchases from QFs shall be just and reasonable to the electric consumer of the electric utility and in the

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[4] *See, e.g.,* Memorandum of Agreement between the Federal Energy Regulatory Commission and the Idaho Public Utilities Commission at 1 (Dec. 24, 2013) (explaining that PURPA established a program of cooperative federalism where State Commissions are responsible for implementing PURPA and may do so "in a manner that accommodates local conditions and concerns so long as the implementation is consistent with PURPA and the FERC's regulations implementing PURPA.") (available at https://www.ferc.gov/sites/default/files/2021-04/mou-idaho-12-2013.pdf, last visited May 23, 2021).

[5] *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980) ("Order No. 69").

public interest, shall not discriminate against the QF, and shall not require the utility to pay more than its "avoided costs" for purchases.[6]

As explained in Order No. 69 and subsequently in FERC's 1983 Policy Statement, PURPA delegates to state commissions and non-regulated public utilities the responsibility of implementing PURPA's "mandatory purchase" requirements, so long as the state's implementation is reasonably consistent with the regulations established by FERC.[7] The Commission must therefore ensure that the rates for purchase from QFs remain just and reasonable to the utility and do not exceed the utility's avoided cost, which may change over time as the utility's costs of purchasing power changes.[8]

Congress has made only limited modifications to PURPA since its enactment in 1978. In 2005, the Energy Policy Act of 2005 adopted PURPA section 210(m), which limited PURPA compliance obligations for utilities operating in regional transmission organizations and competitive wholesale markets.[9]

FERC has also engaged in limited rulemakings to update its PURPA regulations since PURPA's initial enactment in 1978. Of particular note, on July 16, 2020, FERC issued Order No. 872, which modified the PURPA

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[6] 18 C.F.R. § 292.304(a).

[7] Order No. 69, 45 Fed. Reg. at 12,216; *see also Policy Statement Regarding Comm'n's Enforcement Role Under Sec. 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,644 (1983).

[8] 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a).

[9] 16 U.S.C. § 824a-3(m).

regulations "based on demonstrated changes in circumstances since the current PURPA regulations were first adopted to ensure that the regulations continue to comply with PURPA's statutory requirements established by Congress."[10] Among other changes, the revised rules evolve FERC's implementation of PURPA's avoided cost cap on QF rates, by providing state commissions tasked with implementing PURPA increased flexibility in establishing avoided cost rates for purchases of QF power. FERC emphasized that PURPA was not a directive to encourage QF development without limitation,[11] and emphasized that in addition to providing for the encouragement of cogeneration and small power production, the law also provided that FERC could not prescribe a rule that provided for a rate that exceeds avoided cost.[12]

Q. DOES ENCOURAGEMENT OF QF TECHNOLOGIES UNDER PURPA SUPPORT SETTING AVOIDED COST RATES AND POLICIES THAT SUBSIDIZE QFS?

A. No. PURPA encourages QFs by obligating utilities (and by extension, customers) to purchase QFs' output—at the QFs' option—at the utility's full avoided cost. However, Congress was clear that PURPA was not intended to

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[10] *Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 at P 20 (Jul. 16, 2020) ("Order No. 872"), *affirmed and clarified by* Order No. 872-A, 173 FERC ¶ 61,158 (Nov. 19, 2020).

[11] Order No. 872 at P 9.

[12] *Id*. at P 11.

require the utility and ratepayers of a utility to subsidize QFs,[13] and FERC has likewise made this clear, most recently in Order No. 872.[14]

Q. DO THE QF OWNER'S COSTS TO OPERATE THE QF OR ITS ABILITY TO MAKE A PROFIT ON ITS INVESTMENT HAVE A ROLE IN IMPLEMENTING PURPA'S AVOIDED COST REQUIREMENTS?

A. No. Cherokee Witness Nathan Hanson suggests that "[i]f Cherokee is no longer economic to run, it will have to be shut down" and implicitly asserts that Cherokee's operating costs or its investors' expected return on investment should be considered in the Commission's decision-making.[15] However, FERC has made clear that such considerations are not relevant in determining avoided cost, which is based on the incremental costs of alternative energy or "cost avoided" by the utility. In its recent Order No. 872, FERC explained:

> PURPA does not guarantee QFs a rate that guarantees financing. PURPA only requires [FERC] to adopt rules that encourage the development of QF; it ***does not provide a guarantee that any particular QF will be developed or profitable***. This is evident from the structure of PURPA, which ***caps QF rates at the purchasing utility's avoided costs rather than providing for rates that guarantee the recovery of a QF's costs . . .***[16]

DEC/DEP Witness Glen Snider further addresses this point.

[13] Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. 95-1750 at p. 89, 95th Cong., 2d. Sess. 99 (1978) ("The provisions of [section 210] are ***not intended to require the rate payers of a utility to subsidize cogenerators*** or small power producers.") (emphasis added).

[14] Order No. 872 at P 12.

[15] Hanson Direct at 24.

[16] Order No. 872 at P 335.

Q. UNDER PURPA'S "MANDATORY PURCHASE OBLIGATION," IS THERE A LIMIT ON THE TOTAL AMOUNT OF POWER THAT THE COMPANIES MUST PURCHASE FROM QFs?

A. No. Under PURPA, each utility is obligated to purchase power from every QF that commits itself to sell to the utility at the utility's avoided cost.

Q. WHO PAYS FOR THE POWER THAT PURPA REQUIRES THE COMPANIES TO PURCHASE FROM QFs?

A. The Companies' customers pay for all purchases of QF power. The costs of QF power are a wholesale purchased power expense that is simply passed through to customers through DEC's and DEP's fuel clause proceedings.[17] Therefore, the costs DEC incurs to purchase power from Cherokee under its power purchase agreement ("PPA") are passed through to DEC's customers each year, in the same way other fuel costs are passed through to customers.

Q. PLEASE SUMMARIZE SOUTH CAROLINA'S APPROACH TO IMPLEMENTING PURPA'S "MANDATORY PURCHASE" REQUIREMENTS.

A. This Commission has the authority to implement PURPA in South Carolina but must comply with PURPA and FERC's regulations implementing PURPA. On May 16, 2019, the Governor signed into law the South Carolina Energy Freedom Act, which, in part, addresses South Carolina's implementation of PURPA ("Act 62"). Act 62 established a number of new requirements for

[17] S.C. Code Ann. § 58-27-865.

enhanced Commission oversight of PURPA implementation in South Carolina, including biennially approving the Companies' standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement PURPA in South Carolina.[18]

Q. DID ACT 62 CHANGE THE FUNDAMENTAL REQUIREMENTS OF PURPA OR MODIFY THE LIMITS OF AVOIDED COST AS SET FORTH IN FERC'S IMPLEMENTING REGULATIONS?

A. No. Act 62 specifically provides that "any decisions by the commission shall be just and reasonable to the ratepayers of the electrical utility, in the public interest, consistent with PURPA and the [FERC]'s implementing regulations and orders, and nondiscriminatory to small power producers."[19] Importantly, the General Assembly also directed that the Commission, in implementing Act 62, "shall strive to reduce the risk placed on the using and consuming public."[20]

Q. PLEASE EXPLAIN THE DIFFERENCE BETWEEN "SMALL POWER PRODUCERS," AS SPECIFICALLY ADDRESSED IN ACT 62, AND "QUALIFYING FACILITIES," WHICH PURPA REGULATES.

A. The requirements of PURPA apply to all QFs, which comprise two classes of generators: (1) cogeneration facilities meeting certain operational and

[18] S.C. Code Ann. § 58-41-20(A).

[19] *Id*.

[20] *Id*.

efficiency requirements established by FERC's regulations[21] and (2) facilities defined as "small power producers."[22] The General Assembly was specific in Act 62 that the Commission must more closely review and approve the Companies' PURPA implementation framework for "small power producers," as that term is defined in federal law.[23] Small power production facilities are defined as facilities which use biomass, waste, or renewable resources, including solar energy, wind energy or water, to produce electric power, and which, together with other facilities at the same site, have a generating capacity equal to or less than 80 MW.[24] Therefore, while the General Assembly's focus in Act 62 is on small power producers, the mandatory purchase requirements of PURPA extend to all QFs, not just small power producers.

Q. IS CHEROKEE A SMALL POWER PRODUCER?

A. No. Cherokee is a large 98 MW cogeneration QF that exceeds the 80 MW size limit for small power producers.[25] There is no similar size limitation for cogeneration QFs as there is for small power producers.

Q. HAVE FERC AND THIS COMMISSION DISTINGUISHED BETWEEN QFs BASED ON THEIR SIZE IN OTHER WAYS?

A. Yes. FERC recognized in Order No. 69 that smaller QFs could be challenged

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[21] *See generally* 18 C.F.R. §§ 292.201-.205.

[22] *See id*.

[23] S.C. Code Ann. §§ 58-41-10(14), 58-41-20(A).

[24] 18 C.F.R. § 292.204.

[25] 18 C.F.R. §§ 292.203(a)(1), 292.204(a).

by the transactional costs of bilaterally negotiating individualized rates with electric utilities, and required states implementing PURPA to make standard rates and terms available to QFs that are 100 kilowatts ("kW") and smaller.[26] FERC's regulations also provide that states "may" put into effect standard rates for purchases for QFs larger than 100 kW, explaining "that the establishment of standard rates for purchases can significantly encourage cogeneration and small power production, provided that these standard rates accurately reflect the costs that the utility can avoid as a result of such purchases."[27] Thus, in setting the mandatory purchase obligation requirements under its regulations, FERC mandated that standardized avoided cost rates should be made available to small QFs of 100 kW or less (which became known as the "standard offer"), while leaving it to the implementing states and state commissions to determine whether to set standardized avoided cost rates for QFs sized greater than 100 kW. Since 2016, the Commission has approved DEC's standard offer to apply to QFs that are 2 MW and smaller.[28] Act 62 is consistent with the Commission's historic treatment, mandating the standard offer applies to QFs that are 2 MW or smaller.[29]

Q. IS CHEROKEE ELIGIBLE FOR STANDARD OFFER RATES?

A. No. Because Cherokee is a 98-MW facility, it significantly exceeds eligibility

[26] *See* Order No. 69, 45 Fed. Reg. at 12,223; 18 C.F.R. § 292.304(c).

[27] 18 C.F.R. § 292.304(c)(2); Order No. 69 at 12,223.

[28] Order No. 2016-349, Docket No. 1995-1192-E (May 12, 2016).

[29] S.C. Code Ann. § 58-41-10(15).

for standard offer avoided cost rates.

Q. DO FERC'S REGULATIONS AND THE COMMISSION'S PREVIOUS ORDERS CONTEMPLATE UTILITY NEGOTIATIONS WITH LARGE QFs NOT ELIGIBLE FOR THE STANDARD OFFER?

A. Yes. FERC's regulations permit utilities and QFs to negotiate mutually-agreeable, nondiscriminatory terms and conditions that differ from avoided cost rates calculated pursuant to the standard offer.[30] Moreover, the Commission has directed electric utilities and QFs to undertake good faith negotiations of purchase agreements in its early PURPA orders in the 1980s.[31] In its 2016 order implementing PURPA, the Commission also directed that all rates for QFs larger than two MW, or that are otherwise ineligible for the standard tariffs, be negotiated under PURPA and FERC's implementing regulations.[32] The Commission has also continued to emphasize good faith negotiations between

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[30] 18 C.F.R. § 292.301(b). FERC has also provided factors to be considered in developing such "negotiating" avoided cost arrangements. *See* 18 C.F.R. § 292.304(e); *see also Windham Solar LLC and Allco Finance Ltd*., 157 FERC ¶ 61,134 at P 6 (2016) ("Windham Solar"); Order No. 872 at P 93.

[31] *See* Order No. 81-214 at p. 9, Docket No. 80-251-E (Mar. 20, 1981) (recognizing "the substantial flexibility of negotiation which is reserved to each contracting party under part 292.301(b)"); *see also* Order No. 85-347 at pp. 20-21, Docket No. 80-251-E (Aug. 2, 1985) ("The Commission urges voluntary negotiations of long-term contracts"); Order No. 85-770 at pp. 4-5, Docket No. 80-251-E (Sept. 5, 1985) (denying petition for reconsideration and rehearing of Order No. 85-347 and explaining that "[t]he questions of unfairness and financial difficulties are a matter of point of view, needs of the individual QF, needs of the utility, and the needs of the ratepayers. Good faith negotiations should resolve these issues."); Order No. 89-56 at p. 9, Docket No. 80-251-E (Feb. 8, 1989) (continuing to decline to mandate long-term rates as part of the standard PURPA contract and encouraging negotiation).

[32] Order No. 2016-349.

the Companies and large QFs in its most recent avoided cost order implementing Act 62.[33]

III. THE COMPANIES' INDEPENDENT OBLIGATIONS TO IMPLEMENT PURPA

Q. CHEROKEE RELIES ON THE COMPANIES' JOINT DISPATCH AGREEMENT TO ARGUE THAT IT CAN SELL TO EITHER DEC OR DEC OR BOTH COMPANIES. DO YOU AGREE?

A. No. Because DEC and DEP are each separate "electric utilities" under PURPA, they are independently obligated to implement PURPA and purchase QF power at each utility's respective avoided costs. The Joint Dispatch Agreement ("JDA") does not change that independent PURPA obligation or in any way "merge" the two Companies into a single utility.

Q. WHAT IS THE JDA?

A. The Companies obtained FERC's[34] and this Commission's[35] approval of the JDA between DEC and DEP in 2012, as part of the merger between Duke Energy Corporation and Progress Energy Corporation.

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[33] *See* Order No. 2020-315(A) at 23, Docket Nos. 2019-185-E and 2019-186-E (April 17, 2020) (reiterating that QFs and the Companies may negotiate PPAs different from the standard offer so long as the rates do not exceed the utility's actual avoided cost).

[34] *See* Order on Joint Dispatch Agreement and Joint Open Access Transmission Tariff, 139 FERC ¶ 61,193 (Jun. 8, 2012) (conditionally accepting Joint Dispatch Agreement, effective July 2, 2012, between Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (formerly known as Carolina Power & Light Company) on file with the Federal Energy Regulatory Commission in Docket No. ER12-1338-000).

[35] *See* Order No. 2012-517, Docket No. 2011-158-E (Jul. 11, 2012). The NCUC also approved the JDA in its order approving the merger. *See* Order Approving Merger Subject to Regulatory Conditions and

The JDA enables DEC and DEP to transfer economic energy between DEC's and DEP's generating fleets from the system with lower marginal energy costs to displace higher cost system generation on the other system. More precisely, the JDA is an economic energy exchange tool, which relies on hour-by-hour, as-available, non-firm, curtailable transmission and does not reduce availability of firm transmission for long-term wholesale transactions of other network transmission customers.

Q. PLEASE EXPLAIN YOUR PRIOR STATEMENT THAT THE JDA IN NO WAY MERGES THE TWO COMPANIES.

A. The JDA does not enable DEC and DEP to operate as a single utility nor does it in any way facilitate joint capacity planning by DEC and DEP. Following the merger, DEC and DEP continue to operate as separate balancing authorities and utilities, and each is responsible for its own independent resource planning and operations.[36] Indeed, Section 4.1 of the regulatory conditions associated with the merger, as adopted by this Commission[37], explicitly require that the Companies not transfer any rights to generation or transmission facilities between DEC to DEP or to construct generation or transmission facilities for the benefit of the other.[38]

Code of Conduct, N.C.U.C. Docket Nos. E-2, Sub 998 and E-7, Sub 986 (June 29, 2012) ("NCUC Merger Order").

[36] *See* NCUC Merger Order.

[37] *See* Order No. 2012-517.

[38] NCUC Merger Order at Appendix A, p. 17, Regulatory Condition No. 4.1 ("DEC and [DEP] acknowledge that the Commission's approval of the merger and the transfer of dispatch control from [DEP] to DEC for purposes of implementing the JDA and any successor document is conditioned upon

Q. WHAT IS YOUR RESPONSE TO WITNESS HANSON'S CLAIM THAT "GIVEN DUKE'S UNIQUE JOINT DISPATCH ARRANGEMENT AND THE COMMON EMPLOYEES BETWEEN THE COMPANIES, IT WAS PERFECTLY REASONABLE FOR CHEROKEE TO PUT THE POWER TO BOTH OF THE COMPANIES – IN FACT, IT WOULD HAVE BEEN IMPRACTICAL NOT TO DO SO"?[39]

A. I disagree with this statement. To my knowledge, this is the first time a QF has ever asserted a purported right to sell power to both Companies under PURPA at the same time. Again, the JDA provides for transfers of economic non-firm energy but does not modify or "consolidate" each utility's independent purchase obligations under PURPA. Witness Hanson's argument is somewhat analogous to suggesting that because utilities are in a regional transmission organization or "RTO," such as PJM, they all have the same avoided cost. But even in an RTO each electric utility is obligated to implement PURPA based on its own avoided capacity and energy costs. Witness Hanson's statements also demonstrate a lack of understanding of the purely economic role of the JDA and the non-firm, curtailable transmission path between DEC and DEP underlying the JDA's economic energy transfer capability.

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the JDA never being interpreted as providing for: (a) a single integrated electric system, (b) a single BAA, control area, or transmission system, (c) joint planning or joint development of generation or transmission, (d) DEC or [DEP] to construct generation or transmission facilities for the benefit of the other, (e) the transfer of any rights to generation or transmission facilities from DEC or [DEP] to the other, or (f) any equalization of DEC's and [DEP's] production costs or rates.").

[39] Hanson Direct at 16.

Q. PLEASE SUMMARIZE THIS SECTION OF YOUR TESTIMONY.

A. DEC and DEP are both electric utilities obligated to implement PURPA and to purchase the full output of QFs like Cherokee that commit to sell and deliver capacity and energy over a specified future term. Cherokee's generalized suggestion that it can sell its power under a PURPA PPA to both DEC and DEP is unprecedented and incorrect.

IV. LEGALLY ENFORCEABLE OBLIGATION

Q. PLEASE DESCRIBE THE CONCEPT OF A LEGALLY ENFORCEABLE OBLIGATION OR "LEO" UNDER PURPA.

A. FERC's regulations implementing PURPA provide QFs the option to sell power to the utility on either an "as available" basis or pursuant to a "legally enforceable obligation" (or "LEO") at a forecasted avoided cost rate.[40] If a QF establishes a LEO, PURPA provides the QF the option to contract to receive the utility's avoided cost, calculated either at the time power is delivered or prior to commencement of the term "at the time the obligation is incurred."[41] Under FERC's regulations, the LEO evinces a commitment by the QF to "deliver energy and capacity to a utility over a specified term" and thereby obligates the utility to purchase its power in the absence of a mutually-binding contract. FERC has explained that a QF's right to sell its output pursuant to a LEO was intended "to prevent a utility from circumventing the requirement that

[40] 18 C.F.R. § 292.304(d).

[41] 18 C.F.R. § 292.304(d)(1)(ii).

provides capacity credit for an eligible qualifying facility *merely by refusing to enter into a contract with the qualifying facility*."[42] FERC has also made clear that "the establishment of a legally enforceable obligation turns on the QF's commitment, and *not* the utility's actions."[43] Thus, the LEO concept created by FERC in its PURPA regulations is designed to protect the QF's right to sell power to the utility, as the QF and the utility can either negotiate and agree to a PPA or, where the utility refuses to enter into a contract, the QF can bind the utility to purchase power from the QF by establishing a non-contractual, but still binding, LEO.

Q. WHO DETERMINES WHETHER A LEO HAS BEEN ESTABLISHED?

A. The Commission tasked with setting avoided cost rates under PURPA is responsible for determining whether and when a LEO is created, and the procedures for obtaining approval of such an obligation by the QF.[44] Where a QF demonstrates that the utility has effectively refused to tender an executable PPA, the date upon which the QF makes a legally enforceable commitment to sell power to the utility is generally the date that the utility and its customers should become obligated under PURPA to purchase power from the QF.

Q. DOES FERC ORDER NO. 872 ADDRESS THE LEO STANDARD?

A. Yes. In Order No. 872, FERC amended its PURPA implementing regulations

[42] Order No. 69, 45 Fed. Reg. at 12,224 (emphasis added).
[43] *FLS Energy, Inc*., 157 FERC ¶ 61,211 at P 24 (Dec. 15, 2016) (emphasis in original).

[44] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, 119 FERC ¶ 61,305 at P 139 (2007). As I discuss later in my testimony, FERC's recent updates to its regulations in Order No. 872 provide certain foundational requirements that QFs must meet in order to demonstrate a LEO.

to add the requirement that a QF must demonstrate commercial viability and financial commitment to construct its facility pursuant to objective and reasonable criteria determined by the state regulatory authority or nonregulated electric utility as a prerequisite to a QF obtaining an LEO.[45] While these standards are more directly applicable to new QF capacity versus QFs that are operating today, the underlying policy purpose identified by FERC is instructive to the issues raised in the current complaint.

Q. WHAT POLICY PURPOSE DID FERC PROVIDE FOR ADDING THIS REQUIREMENT TO ITS PURPA RULES?

A. FERC stated that the requirement "can sufficiently demonstrate QF developers' financial commitment in the QF development and allows utilities to reasonably rely on the LEO in planning for system resource adequacy."[46] FERC also stated that the intent of the rule is "to provide a reasonable balance between providing QFs with objective and transparent milestones up front that are needed to obtain a LEO, allowing states the flexibility to establish factors that address the individual circumstances of each state, and increasing utilities' ability to accurately plan their systems."[47] In sum, the new rule will help ensure that the QF is making a real and binding commitment at the time it asserts a LEO in order to help the electric utility rely upon the QF's capacity for the future term of the purchase contract.

[45] Order No. 872 at P 684; 18 C.F.R. § 292.304(d)(3).
[46] Order No. 872 at P 687.
[47] *Id*. at P 688.

Q. ARE YOU FAMILIAR WITH THE COMPANIES' PROCESS FOR NEGOTIATING PPAS WITH LARGER QFs IN SOUTH CAROLINA?

A. Yes, generally. The Companies follow a standardized process for negotiating a PPA with large QFs. The process begins with a QF requesting and the utility delivering avoided cost pricing to allow the QF to elect to commence negotiations of a PPA. This avoided cost pricing is valid for a set period of time, usually 60 days. A QF can request an executable PPA with that pricing at any time. Once the parties are in full agreement on all terms and conditions of the PPA, DEC or DEP would provide a final executable PPA to the QF to sign. This standardized process results in a PPA that memorializes the QF's contractual commitment to commence delivering power to the utility on its committed commercial operation date for the specified term of the PPA, while also ensuring that QF is making a meaningful and binding commitment to sell its power to DEC or DEP. DEC/DEP Witness Snider discusses this process in more detail.

Q. DO YOU AGREE WITH WITNESS HANSON'S ARGUMENT THAT CHEROKEE "ESTABLISHED LEOs WITH BOTH DEP AND DEC IN LATE 2018?"[48]

A. No. Witness Snider and DEC/DEP Witness Michael Keen provide more detailed testimony on this issue, but based on my review of the correspondence between Cherokee and the Companies, Cherokee's actions clearly did not

[48] Hanson Direct at 9.

establish a LEO in 2018, as Cherokee never actually committed to sell its power to either DEC or DEP.

First, the ability of a QF to provide energy or capacity pursuant to an LEO involves the payment of rates for such purchases based on "the avoided costs" calculated either at the time of delivery or the time the obligation is incurred.[49] By rejecting each of the Companies' repeated offers of avoided cost rates and PPAs and making counter offers at rates well above the Companies' avoided costs, Cherokee's claim of an LEO is inconsistent with FERC's regulations and PURPA, which limits the Companies' purchase obligations to rates set based on the utility's avoided costs.

Further, Cherokee's claim that it established a LEO cannot be squared with the fact that after it purported to commit to sell its "full output" to DEC, in September 2018, it offered to sell capacity and energy to DEP in in December 2018. As further described by Witness Keen, Cherokee purported to establish a second LEO with DEP and requested to enter into negotiations with DEP while the avoided cost rates that DEC had provided in October 2018 were still available pending negotiation of a PPA. Each of its actions indicate that Cherokee could walk away at any point in the process without any obligation to DEC or DEP; no legally enforceable commitment to sell power is created under such circumstances.

[49] 18 C.F.R. § 292.304(d)(1)(ii).

Finally, Cherokee recently argued to FERC that upon expiration of the current 2012 PPA, it "indisputably" has the right to, and is contemplating, the option of selling its output to third parties.[50] These statements clearly undermine Cherokee's claim to have made a legally enforceable commitment to sell and deliver its capacity and energy to DEC following termination of the PPA. No LEO can be argued to have been established considering such clear statements of Cherokee's lack of commitment to either DEC or DEP.

Q. WERE CHEROKEE'S ACTIONS CONSISTENT WITH FERC'S GOALS OF ENSURING THAT QF COMMITMENTS TO SELL POWER REASONABLY ALLOW ELECTRIC UTILITIES TO RELIABLY PLAN THEIR SYSTEMS WHILE ENSURING RESOURCE ADEQUACY, AS DISCUSSED IN ORDER NO. 872?

A. No, they were not. Cherokee's actions effectively prevented either DEC or DEP from relying on the Cherokee facility in order to reliably and accurately plan to meet its system capacity needs after the current PPA term expired. At no point was Cherokee bound to deliver power beginning January 1, 2021, and could (and still can) shut down its facility or sell its power to another utility if it finds DEC's or DEP's avoided costs to be unsatisfactory to achieve the profitability required by its owners and investors.

[50] *See Cherokee County Cogeneration Partners, LLC*, Request for Rehearing at 11-12, Docket No. ER21-304-002 (May 3, 2021) ("[u]pon expiration of the PPA, Cherokee will indisputably 'ha[ve] the right to sell to a third party,' and, in obtaining and maintaining its market-based rate authorization, Cherokee has provided … 'manifestation of [Cherokee]'s "plan to sell" output to third parties' after the termination of the PPA….").

Q. IS THE LEO REQUIREMENT INTENDED TO GUARANTEE FINANCING FOR QFS?

A. No. Both Witness Hanson and Cherokee Witness Kurt Strunk reference the facilitation of QF financing as one of the goals of the LEO requirement.[51] Witness Strunk appears to go further and states that "PURPA assures a market for QF output and *assures QF financeability*."[52] As I discuss above, however, neither PURPA nor FERC's implementation regulations or precedent provide any guarantee or "assurance" of financeability for a QF, either new or existing. FERC has made clear that a LEO "should be long enough to allow QFs *reasonable opportunities to attract capital from potential investors*,"[53] but the LEO is not intended to assure QF financing. More recently, FERC clearly explained in Order No. 872 that "PURPA does not guarantee QFs a rate that guarantees financing. PURPA only requires [FERC] to adopt rules that encourage the development of QF; it does not provide a guarantee that any particular QF will be developed or profitable."[54] Indeed, FERC's recent revisions to its rules in Order No. 872 with regard to requiring a QF to show commercial viability and financial commitment in order to establish a LEO actually highlight FERC's concern with protecting the utility side of the balance

[51] Strunk Direct at 4; 8-9; Hanson Direct at 8-9.

[52] Strunk Direct at 6 (emphasis added).

[53] *Windham Solar*, 157 FERC ¶ 61,134 at P 8; *see also* Strunk Direct at 9 (emphasis added).

[54] Order No. 872 at P 335.

between encouraging QF development and protecting utility customers, by ensuring that QFs who commit to sell are truly prepared to do so.[55]

V. FIRST YEAR OF PROJECTED CAPACITY NEED

Q. CHEROKEE COMPLAINS ABOUT THE LACK OF A CAPACITY PAYMENT IN THE 2018 AVOIDED COST RATES DEC OFFERED. CAN YOU COMMENT ON THE APPROPRIATENESS OF NOT PAYING QFs FOR CAPACITY IN YEARS IN WHICH THE UTILITY DOES NOT HAVE A CAPACITY NEED?

A. Yes. One principal aspect of PURPA was, and remains, that QFs should be fairly and reasonably compensated for the incremental capacity and energy costs that, *but for* capacity and energy provided by the QF, the utility would be forced to generate or purchase elsewhere to serve its customers.[56] If the purchase of power from a QF does not, in part or in total, avoid the utility's need to incur incremental capacity and energy expense, then the QF should not be compensated for providing that benefit. PURPA was not intended to force a utility (and its customers) to pay for capacity that it does not otherwise need; *i.e.,* if the QF is not allowing the utility to avoid capacity that the utility would otherwise generate or purchase from another source, then there is no incremental capacity cost being avoided.

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[55] *Id.* at P 684 ("We find that requiring a showing of commercial viability and financial commitment, based on objective and reasonable criteria, will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development, and therefore, for which it would be unreasonable for a utility to include in its resource planning.").

[56] 16 U.S.C. § 824a-3(d) (defining incremental cost of alternative energy under PURPA).

Q. HAS FERC SPOKEN TO THIS ISSUE?

A. Yes. Both Order No. 69[57] and subsequent FERC decisions[58] have reinforced this point. Most recently, in Order No. 872, FERC reiterated that:

> PURPA does not direct the Commission to guarantee that QF sales make up some specified share of utilities' capacity needs nor does it require that each QF receive compensation for providing capacity. PURPA instead focuses on the purchasing electric utility's avoided costs and provides that the Commission cannot require that prices charged by a QF exceed the purchasing electric utility's avoided cost, ***if a purchasing electric utility has no need for additional capacity . . . the purchasing utility's avoided cost for capacity would be zero***.[59]

FERC went on to say that when a purchasing electric utility is not avoiding the construction or purchase of capacity as a consequence of entering into a contract with a QF, the only costs being avoided by the purchasing electric utility would be the incremental costs of purchasing or producing energy at the time the energy is delivered.[60] Additionally, FERC clarified that nothing in PURPA or the legislative history of PURPA suggests that the Commission should set QF rates so as to facilitate the financing of new QF capacity in locations where no new capacity is needed.[61]

[57] Order No. 69, 45 Fed. Reg. at 12,219, 12,226.

[58] *See, e.g., City of Ketchikan, Alaska*, 94 FERC ¶ 61,293, at 62,061 (2001) ("*Ketchikan*").

[59] Order No. 872 at P 171 (citing 168 FERC ¶ 61,184 at P 33 n.58 and *Ketchikan,* 94 FERC ¶ 61,293).

[60] *Id*. at P 347.

[61] *Id*.

Q. HAS THIS COMMISSION ALSO ADDRESSED THE APPROPRIATE METHODOLOGY FOR DEC AND DEP TO USE IN CALCULATING AVOIDED CAPACITY RATES?

A. Yes. In the initial 2019 avoided cost case under Act 62, the Commission approved the Companies' avoided capacity cost rates, which aligned with each utility's designated "first year of need" in their respective 2019 IRP Updates.[62] The Commission also concluded that "PURPA therefore does not force a utility and its customers to pay for capacity that it otherwise does not need to serve customers . . . customers should not be required to pay solar QFs for capacity prior to the first year in which it is needed to serve system load"[63]

Q. HAVE THE COMPANIES' AVOIDED COST RATES PRESENTED TO CHEROKEE, INCLUDING THE SEPTEMBER 2018 RATE OFFER, BEEN CONSISTENT WITH THESE FERC AND COMMISSION CONCLUSIONS?

A. Yes. Providing avoided capacity credits to QFs based upon the actual capacity being avoided by the purchase of power from the QF as reflected in the Companies' IRPs effectuates this concept in practice. Witness Snider provides additional discussion of this issue from a system planning perspective.

[62] Order No. 2019-881(A) at 30, 89 ("DEC and DEP have appropriately identified their first avoidable capacity need, as presented in the utilities' 2019 Integrated Resource Plans.").

[63] *Id*. at 91.

VI. WHEELING POWER TO DEP

Q. ONE OF THE MORE COMPLEX ISSUES RAISED BY WITNESS HANSON[64] RELATES TO CHEROKEE'S RIGHT UNDER PURPA TO TRANSMIT AND SELL POWER TO DEP. CAN YOU COMMENT GENERALLY?

A. Yes. The Companies agree that PURPA provides QFs with rights to sell (1) to the interconnected utility and (2) to any other utility to which the QF can deliver its output. As to the second option, FERC's regulations provide that the interconnected utility, at the QF's request, may "transmit the [QF's] energy or capacity to any other electric utility" that would then be obligated to purchase the QF's output at its avoided costs "as if the qualifying facility were supplying energy or capacity directly to such electric utility."[65] The key issues raised by Witness Hanson that need to be clarified are what are the respective obligations of Cherokee, DEC, and DEP should Cherokee elect to "wheel" or transmit its power to DEP (or another electric utility) in order to sell to that utility under PURPA.

Q. FIRST, WHY WOULD CHEROKEE ELECT TO WHEEL ITS POWER TO DEP VERSUS SELLING TO DEC AS THE INTERCONNECTED UTILITY?

A. Presumably, Cherokee would do so for the financial benefit of higher avoided

[64] *See* Hanson Direct at 7-8, 17-19.

[65] *See* 18 C.F.R. § 292.303(d).

cost rates. Witness Hanson seems to suggest as much when he testifies that "PURPA ensures that the Qualifying Facility would have the ability to put its power to a different utility where the avoided capacity and/or energy costs are higher than that available from its interconnecting utility."[66] Witness Keen also addresses this issue based on his recent experience with LS Power and Cherokee.

Q. IF CHEROKEE ELECTS TO WHEEL ITS POWER TO DEP IN ORDER TO SELL TO DEP UNDER PURPA, WHAT ARE DEC'S OBLIGATIONS AS THE INTERCONNECTED UTILITY?

A. Witness Hanson gets this right, before confusing the issues later on in his testimony. He states: "It should be uncontroversial that Cherokee may elect to avail itself of non-discriminatory transmission arrangements in order to assert its PURPA rights, both as a matter of PURPA and Duke's responsibility to offer non-discriminatory service as part of its Joint Open Access Transmission Tariff filed with the [FERC]."[67] Under both PURPA and the open access transmission requirements of the OATT, I agree that Cherokee has the right to request DEC to transmit and deliver Cherokee's capacity and energy to DEP or another utility and DEC is obligated to provide this transmission service on a non-discriminatory basis under the Companies' OATT.

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[66] Hanson Direct at 8.

[67] *Id.* at 7-8.

Q. IF CHEROKEE ELECTS TO WHEEL ITS POWER AND TO SELL TO DEP UNDER PURPA, WHAT ARE DEP'S OBLIGATIONS?

A. If Cherokee elects to sell its power to DEP under PURPA (and Cherokee makes arrangements to actually deliver its capacity and energy to DEP), DEP must purchase Cherokee's power at its avoided cost just like it would if Cherokee was directly interconnected to DEP. This is clearly prescribed in FERC's regulations, which provide that the non-interconnected utility would be obligated to purchase the QF's output at its avoided costs.[68]

Q. IF CHEROKEE ELECTS TO WHEEL ITS POWER TO DEP AND TO SELL TO DEP UNDER PURPA, WHAT ARE CHEROKEE'S OBLIGATIONS?

A. This is one of the important points that Cherokee seems to be missing. To sell to DEP, it is Cherokee's obligation to arrange for transmission service under the OATT to deliver its power out of DEC to DEP. As highlighted above, DEC and DEP remain separate electric utilities operating separate power systems with separate and distinct transmission systems and separate avoided costs. According to Witness Keen, Cherokee never took the necessary steps to request transmission service from DEC to deliver its output to DEP.

[68] 18 C.F.R. § 292.303(d).

Q. HAS FERC MADE CLEAR THAT IT IS THE QF'S OBLIGATION TO DELIVER ITS OUTPUT TO A NON-INTERCONNECTED UTILITY IN ORDER TO REQUIRE THAT UTILITY TO PURCHASE ITS CAPACITY AND ENERGY?

A. Yes. This issue has not come up often since QFs rarely undertake reserving point-to-point transmission service to sell their power to a non-interconnected utility in an effort to obtain higher avoided cost rates. However, this did come up in a 2013 declaratory order proceeding where FERC affirmed that "[a] utility is obligated under PURPA . . . to purchase the output of a QF, even a QF located in another state, as long as the QF can deliver its power to the utility" and that "[t]he QF has the discretion to choose to sell to a more distant utility . . . as long as the QF can deliver its power to the utility[.]"[69]

Q. HAS CHEROKEE REQUESTED TRANSMISSION SERVICE FROM DEC UNDER ITS OATT TO DELIVER ITS CAPACITY AND ENERGY TO DEP?

A. No. While I understand that Cherokee has made some preliminary inquiries to Witness Keen about delivering its power to DEP, Cherokee has not submitted a transmission service request under the OATT to deliver its power to DEP out of DEC. If Cherokee had done so, DEC would be obligated to study the cost of providing the requested service and, if Cherokee elected to contract for such

[69] *Kootenai Elec. Coop. Inc.,* 143 FERC ¶ 61,232 at PP 1, 33 (2013).

service, provide such service under the non-discriminatory procedures for transmission service approved by FERC in the OATT.

Q. IF CHEROKEE HAS A DISPUTE ABOUT TRANSMISSION SERVICE UNDER THE COMPANIES' OATT, IS THAT A PURPA ISSUE FOR THE COMMISSION TO DECIDE?

A. No. Arrangements for transmission service are not regulated by this Commission. They are FERC-jurisdictional and governed by the Companies' OATT.

Q. WITNESS HANSON ALSO CLAIMS THAT CHEROKEE IS ENTITLED TO BE DESIGNATED BY DEC/DEP AS A NETWORK RESOURCE AND THEREBY DELIVER ITS POWER TO EITHER COMPANY. DO YOU AGREE?

A. No. Witness Hanson claims first that "utilizing the Cherokee Facility as a network resource would be consistent with Duke's obligation to jointly dispatch the DEC and DEP systems that resulted from the FERC merger proceeding that permitted the merger of Duke and Progress Energy, and the obligation that FERC imposed that the DEC and DEP joint systems not raise barriers to Qualifying Facilities."[70] He also asserts that "[Cherokee] is further entitled to be deemed a network resource by Duke given their joint dispatch arrangements, such that Cherokee could deliver its power to provided energy and capacity to

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[70] Hanson Direct at 17.

DEP and/or DEC in a way that optimizes Cherokee as a resource."[71]

First of all, the designation of network resources and the obligations and rights associated with such designation are set forth in the Companies' OATT and is exclusively within the jurisdiction of FERC. To briefly address these allegations, I would reiterate that DEC and DEP maintain plan and operate separate balancing authorities with separate network resources to serve their respective customers. DEC and DEP do not jointly own any generation facilities, and do not jointly designate network resources, so there are no "joint Duke network resources" as Cherokee suggests. Cherokee's statements in this regard demonstrate a lack of understanding of DEC's and DEP's approach to network resources to provide firm native load service to customers. I believe Witness Hanson is confusing the impact of the Companies' coordinated approach of dispatching their respective resources to share non-firm energy and believes this limited "joint dispatch" means that Cherokee, as a QF, may sell its capacity and energy jointly to both DEC and DEP. This is not the case. The JDA allows DEC and DEP to jointly dispatch their resources to share economic energy on a non-firm basis (*i.e.* when transmission service is available to do so), as opposed to creating some form of "joint PPA," as Witness Hanson seems to believe is the case. Again, as I mention above, I have never heard of a QF attempting to sell its power to both DEC and DEP nor would that be acceptable to DEC and DEP.

[71] *Id.* at 25.

Q. DOES WITNESS HANSON MAKE ANY OTHER TRANSMISSION-RELATED STATEMENTS THAT ARE INCORRECT?

A. Yes. He makes a number of them on pages 17-18 of his testimony, demonstrating a fundamental lack of understanding of the Companies' OATT and transmission system operations more generally.

First, he wrongly suggests that DEC's generating facilities are "recognized as a network resource" for DEP and that adding Cherokee to this arrangement would make the transmission service free to Cherokee.[72] This is incorrect because DEC has designated its generating facilities to serve DEC's network load under the OATT and DEP has designated its generating facilities to serve DEP's network load under the OATT.[73] So DEC's generation facilities are not designated network resources for DEP just as DEP's generation facilities are not designated network resources for DEC. Again, DEC and DEP are separate utilities that independently own generation facilities (or purchase the output therefrom) that each utility uses to serve its own set of discrete customers within its own networked transmission system.[74] DEP is required to (and has) reserved transmission service to import power from DEC under the OATT,

[72] *Id.* at 17.

[73] OATT at Section 30.1 ("Network Resources shall include all generation owned, purchased or leased by the Network Customer designated to serve Network Load under the Tariff.") (available at http://www.ferc.duke-energy.com/Tariffs/Joint_OATT.pdf, last visited May 23, 2021).

[74] DEC's and DEP's designated network resources are listed on their respective open access transmission system websites at https://www.oasis.oati.com/woa/docs/CPL/CPLdocs/DEP_DNR_List_050321.pdf (DEP) and https://www.oasis.oati.com/woa/docs/DUK/DUKdocs/DEC_DNR_List_050321.pdf (DEC).

which is the same step that Cherokee has the right to take if it wants to do so.

Second, Witness Hanson's suggestion that "utilizing the Cherokee Facility as a network resource would be consistent with Duke's obligation to jointly dispatch the DEC and DEP systems that resulted from the FERC merger proceeding . . ." is also incorrect.[75] As I explain above, the JDA is a non-firm economic, incremental-cost energy transfer tool, which relies on hour-by-hour, as-available, non-firm, curtailable transmission and does not rely on firm transmission out of DEC to deliver energy to DEP. The JDA has no relevance to whether Cherokee has reserved firm point-to-point transmission service out of DEC to sell its power to DEP under PURPA.

Third, he asserts that "DEP could easily add Cherokee as a network resource under its OATT, which would likely result in a zero or negligible change to DEP's network service charge, as compared to imposing point-to-point transmission charges on Cherokee."[76] However, DEP is not obligated to advantage Cherokee by requiring DEP's customers to pay any increased transmission service costs to deliver Cherokee's power out of DEC to DEP. DEP and its customers are obligated to pay Cherokee DEP's full avoided cost if Cherokee delivers its power to DEP, but it is Cherokee's obligation, in coordination with DEC, the transmitting utility, to make arrangements for delivery of the power. DEP and DEC must treat all QFs in non-discriminatory manner and cannot advantage Cherokee over other QFs.

[75] Hanson Direct at 17.
[76] *Id.* at 18.

Q. PLEASE SUMMARIZE THIS SECTION OF YOUR TESTIMONY.

A. DEP would be obligated to purchase Cherokee's power at DEP's avoided cost if Cherokee takes the necessary steps to arrange for delivery of Cherokee's power to DEP. To date, however, Cherokee has not taken the necessary steps to arrange to transmit its power out of DEC to DEP. The Companies also cannot provide any preferential treatment to Cherokee under the OATT, and Witness Hanson's understanding of those OATT provisions are incorrect in a number of respects.

VII. <u>CONCLUSION</u>

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.